

**King Electric, Inc. and International Brotherhood of Electrical Workers, Local Union No. 8, AFL-CIO. Case 8-CA-35105**

October 29, 2004

**DECISION AND ORDER**

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed on June 15 and August 4, 2004, respectively, the General Counsel issued the complaint on August 19, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 8-RC-16240. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On September 13, 2004, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On September 16, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. Thereafter, the Union also filed a Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its objections to conduct alleged to have affected the results of the election in the representation proceeding.<sup>1</sup>

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<sup>1</sup> The Respondent also contends that a change in the size of the bargaining unit from 11 to 6 employees shortly after the election constitutes "unusual circumstances" relieving it of its obligation to bargain with the Union. In support of this contention the Respondent principally relies on *Ray Brooks v. NLRB*, 348 U.S. 96, 98 (1954), wherein the Court noted that the Board has evolved the following rule: "A certification, if based on a Board-conducted election, must be honored for a 'reasonable period,' ordinarily 'one year,' in the absence of 'unusual circumstances.'" The Court further noted that in "representation cases in which a rival union sought a new election less than a year after certification," the Board has found such "unusual circumstances," where "the size of the bargaining unit fluctuated radically within a short time." 348 U.S. at 99, citing *Westinghouse Electric & Mfg. Co.*, 38 NLRB 404, 409 (1942).

The Respondent's reliance on *Ray Brooks* is misplaced. The rule quoted in *Ray Brooks* pertaining to radical fluctuations in the size of the bargaining unit was developed by the Board in a representation case where the issue was whether to entertain a new petition within one year

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.<sup>2</sup> See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the General Counsel's Motion for Summary Judgment.<sup>3</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, an Ohio corporation, has been engaged in retail electrical contracting from its facility located in Toledo, Ohio. Annually, in the course and conduct of its business, the Respondent derives gross revenues in excess of \$500,000 from its Toledo, Ohio facility and purchases and receives materials valued in excess of \$2000 directly from points located outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Brotherhood of Electrical Workers, Local Union No. 8, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

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of the issuance of a certification. In unfair labor practice cases, such as this, involving an employer's refusal to recognize a union during the initial year of certification, the Board has uniformly held that employee turnover does not constitute "unusual circumstances" relieving an employer of its obligation to bargain. See, e.g., *Action Automotive*, 284 NLRB 251 fn. 1 (1987), *enfd.* 853 F.2d 433 (6th Cir. 1988), *cert. denied* 488 U.S. 1041 (1989), and *Murphy Bros.*, 265 NLRB 1574, 1575, fn. 3 (1982) (employee turnover not the kind of "unusual circumstance" within the meaning of the Supreme Court's decision in *Ray Brooks* that would permit rebuttal of union's majority status during the certification year).

<sup>2</sup> Member Schaumber and Member Meisburg did not participate in the Board's November 30, 2001 Decision and Order or in the Board's December 20, 2001 Decision and Order in the representation proceeding. However, they agree that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decisions and orders in the representation proceeding.

<sup>3</sup> The Respondent's motion to dismiss the complaint, its request for oral argument, and its request for reconsideration of the Board's decisions and orders in the representation proceeding are therefore denied. Further, in view of this result, we find it unnecessary to rule on the Union's Motion for Summary Judgment.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Certification*

Following the election held August 9, 2001, the Union was certified on April 29, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All electrical workers, journey persons, and electrical apprentices employed by the Employer at its 1952 West Sylvania, Toledo, Ohio, facility, but excluding all office clerical employees, owners, professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. *Refusal to Bargain*

The Union, by letter dated May 18, 2004, requested the Respondent to bargain, and, since about May 18, 2004, the Respondent has failed and refused to do so. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing on and after May 18, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, King Electric, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Electrical Workers, Local Union No. 8, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All electrical workers, journey persons, and electrical apprentices employed by the Employer at its 1952 West Sylvania, Toledo, Ohio, facility, but excluding all office clerical employees, owners, professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 18, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local Union No. 8, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All electrical workers, journey persons, and electrical apprentices employed by us at our 1952 West Sylvania, Toledo, Ohio, facility, but excluding all office clerical employees, owners, professional employees, guards, and supervisors as defined in the Act.

KING ELECTRIC, INC.